Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SALLIE B. HOLLOWAY,

Petitioner,

v.

HANSFORD T. JOHNSON, Acting Secretary of the Navy; CHIEF OF NAVAL PERSONNEL, Washington, DC; CHIEF, NAVAL RESERVE PERSONNEL CENTER, New Orleans, LA; COMMANDER, NAVAL RESERVE FORCE, Washington, DC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the U.S. Court of Appeals for the Ninth Circuit has entered a decision in conflict with the a decision of the U.S. Court of Appeals for the Fifth Circuit on the issue of whether Mandamus jurisdiction in conjunction with declaratory relief is available in a U.S. District Court to declare as to the validity of a regulation required by statute and award monetary relief, when the U.S. Court of Federal Claims has determined previously that the U.S. Court of Federal Claims, as to the claims in each of the Circuits, does not have jurisdiction to award monetary relief under either regulation or statute?

Whether the Petitioner has been denied access to all possible Courts where both a U.S. District Court in Petitioner's case and the U.S. Court of Federal Claims in another case as to the same claim have declined to review a regulation of a military service for declaratory relief under its statutory jurisdiction and when each of the Courts state that jurisdiction resides in the other?

Whether the concept of "justiciability" has any application in either a U.S. District Court or the U.S. Court of Federal Claims when either court sits on appeal of a decision of a military correction board under the board's subject matter jurisdiction conferred by Congress "to correct error or remove an injustice"?

PARTIES TO THE PROCEEDING

Petitioner is Sallie Holloway (hereinafter "Holloway") who is a Naval Reserve Officer, presently serving at the rank of Captain (pay grade 0-6) in the active Reserve and who was on active duty in the United States Navy as a Reserve Officer at the rank of Commander (pay grade 0-5) when released from active duty to the active Reserves.

Respondent Hansford T. Johnson is the duly appointed acting Secretary of the Navy named in his official capacity.[1] The Respondents Chief of Naval Personnel, Chief, Naval Reserve Personnel Center, and Commander, Naval Reserve Force, are named in their official capacity in terms of assignment.

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1. Johnson has recently been appointed as the Acting Secretary of the Navy to replace Gordon R. England who has been appointed as the Assistant Director of the Department of Homeland Security.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A) is unreported. The district court opinion (App. B) is also unreported. The district court opinion (App. C) is also unreported. The Ninth Circuit Opinion On Rehearing En Banc (App. D) is also unreported.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on October 11, 2002. The Court of Appeals entered an order denying a timely petition for rehearing en banc on February 4, 2003.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, CIVIL RULE, AND REGULATORY PROVISIONS INVOLVED

Constitution:

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Statutes:

5 U.S.C. § 702 provides in pertinent part:

> A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof . . .

10 U.S.C. § 1293n., entitled: "Twenty years or more: warrant officers" provides in pertinent part at note (as to Navy):

> n. (b)(2) During the active force drawdown period, the Secretary of the Navy may—
>
> (A) apply the provision of section 6323 of such title [section 6323 of this title], to an officer with at least 15 but less than 20 years of service. . . .

10 U.S.C. § 1552 provides in pertinent part:

> (a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice . . . acting through boards of civilians of the executive part of that military department.

10 U.S.C. § 12313(a) provides:

> Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty.

10 U.S.C. § 12731a(c) provides:

> (1) The Secretary concerned may limit the applicability of subsection (a) to any category of personnel defined by the Secretary in order to meet a need of the armed force under the jurisdiction of the Secretary to reduce the number of members in certain grades, the number of members who have completed a certain number of years of service, or the number of members who possess certain military skills or are serving in designated competitive categories.[2]

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S. C. § 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

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2. The regulation cited in Appendix e herein does not cite to the statute which applies to implement TERA whether it be this statute as to Reserves generally or to 10 U.S.C. § 1293n. above. Holloway is a Reservist and 10 U.S.C. § 12731a above should apply, both for this reason as well as interpreting fairly what is meant by this statute in relation to the Reserve Personnel Management Act as a whole, of which § 12731a is a part.

28 U.S.C. § 1491 provides in pertinent part:

> (a)(1) The United States Court of Federal Claims shall have jurisdiction to render any judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department. . . .

28 U.S.C. § 2201 provides in pertinent part:

> (a) In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Federal Rule of Civil Procedure 57 provides in pertinent part:

> The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. § 2201, shall

> be in accordance with these rules . . . The existence of another adequate remedy does not preclude judgment for declaratory relief in cases where it is appropriate . . .

Regulations:

See Appendix E attached.

STATEMENT OF THE CASE

Holloway was a Navy Commander in Reserve status on active duty in the U.S. Navy serving in what is referred to as a "Canvasser Recruiter" prior to her release from active duty on 01 July 1997. She has been promoted to Captain subsequently while in active Reserve status. The Navy had implemented a program pursuant to statute (see footnote 2) entitled "Temporary Early Retirement Authority" ("TERA"), and Holloway had met all the requirements of the implementing statute applicable to Reserves on active duty. Holloway applied for TERA both to Navy administrative authorities and then to the Board for Correction of Naval Records ("BCNR"), but said application was denied by both authorities, the first while she was on active duty, and the second by the BCNR on 26 October 1999. Naval authorities opined that while all other categories of Reserves on extended active duty were eligible for TERA, those as Canvasser Recruiters were not.

A. The Federal Court system conflict in terms of TERA:

Insofar as is known, Holloway is the first application made to a U.S. District Court under authorized jurisdiction to obtain declaratory relief that she is and was eligible at the

time for TERA as a Reserve officer on active duty and that the disqualification of eligibility under regulation is and was void. Had she been able to argue such on the merits of her application for relief, Holloway would have presented a compelling case that the exclusion of Canvasser Recruiters from eligibility for TERA is (1) a violation of the policy provisions against discrimination as prohibited by Congress in 10 U.S.C. § 10209, (2) arbitrary and capricious adoption of exclusion in a regulation without a distinction in the categories which allowed TERA, and (3) a manifest abuse of discretion for not awarding her TERA, both initially under the regulation and before the BCNR within the scope of its authority. In short there is no difference in terms of status between Canvasser Recruiters and all other Reserve classifications on active duty otherwise eligible for TERA. She presented these arguments before the BCNR.

TERA has been argued in two different settings before the U.S. Court of Federal Claims. In *Greek v. United States*, 44 Fed. Cl. 43 (1999), a Coast Guard regulation excluded Reserve officers from TERA, and the Court of Federal Claims held that it had no jurisdiction to hear this claim since the claim was barred by regulation. "Justiciability" of a claim by a Reserve on active duty was also cited to separately by the Court in *Greek* as disqualifying. In *McMullen v. United States*, 50 Fed. Cl. 718 (2001), the Army had no regulation, thereby violating the statute, and, thus, the statute itself was at issue. The Court of Federal Claims held here also that there was no jurisdiction as well as stating separately that the matter was not "justiciable".[3]

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3. *McMullen* is pending oral argument in the U.S. Court of Appeals for the Federal Circuit, although McMullen is back on active duty in the Army having been recalled for the Iraq War, and a Motion (Cont'd)

Thus, Holloway's claims would have been dismissed by the Court of Federal Claims on the basis of these two cases, since her claim would have been decided either on the basis of *Greek id.* or *McMullen id.* The Court of Federal Claims does not have declaratory relief under this Court's decision in *Testan v. United States*, 424 U.S. 392 (1976). Holloway filed in the U.S. District Court for this reason seeking the declaratory relief which would have been denied her in the Court of Federal Claims, yet both the District Court and the Ninth Circuit indicated and, with full knowledge of these two cases, insisted that only the Court of Federal Claims has jurisdiction to hear her case. While she has a clear right to have a regulation reviewed under the Fifth Amendment Due Process Clause and this Court's decision in *Harmon v. Brucker*, 355 U.S. 579 (1958), she has been denied a forum in the federal court system to assert her claim, each possible court pointing to the other as the proper forum to hear it.

This Court needs to direct which Court has jurisdiction to hear the same and whether the concept of "justiciability" has any application at all in review of a decision of a military correction board under the subject matter jurisdiction of the board's authority.

B. Proceedings Below:

Holloway filed her complaint in the U.S. District Court for the Northern District of California at Oakland. The matter came before the Court on the Defendant's Motion to Dismiss.

(Cont'd)
for Summary Reversal of the Court of Federal Claims is pending on the ground that McMullen was wrongfully released from active duty in the first place and has been administratively reinstated and the case settled without Court approval.

After briefing, the Court granted the Defendant's Motion under Fed. R. Civ. P. 12(b)(1), and the District Court entered judgment of dismissal on October 20, 2000. Holloway's Motion for Reconsideration was denied on January 31, 2001. The Court of Appeals affirmed on October 11, 2002, and denied Holloway's Petition for Rehearing En Banc on February 4, 2003. All matters were timely filed.

REASONS FOR GRANTING THE WRIT

I. Mandamus Jurisdiction Coupled with Declaratory Relief

A. Policy:

Holloway relies on United States Supreme Court Rule 10(a) wherein the Ninth Circuit Court of Appeals has entered a decision in the above matter in conflict with the decision of the Fifth Circuit Court of Appeals styled *Turner v. Weinberger*, 728 F.2d 751 (5th Cir. 1984) on the issue of the applicability of mandamus jurisdiction and declaratory relief to seek monetary relief from the U.S. Government, or an agency thereof, in a U.S. District Court when the U.S. Court of Federal Claims, or its predecessor Court, has entered a decision dismissing a claim for the reason that that Court does not have jurisdiction to hear and decide the same claim for relief.

B. The Writ Should Be Granted to Decide Whether a U.S. District Court Has Jurisdiction under Mandamus Jurisdiction 28 U.S.C. § 1361 in Conjunction with Declaratory Relief When the U.S. Court Of Federal Claims Has Held It Is Without Jurisdiction to Declare Relief for the Same Claim for Monetary Relief

As indicated above, the U.S. Court of Federal Claims has heard two cases on the issue of a claim for payment of TERA to a military member, and in both cases the Court held that the Court did not have jurisdiction to hear and decide the matter. *Greek*, 44 Fed. Cl. at 43; *McMullen*, 50 Fed. Cl. at 718. It is unclear in both cases whether the Court of Federal Claims includes the judicial policy of "non-justiciability" within the penumbra of jurisdiction or is a separate ground for denial. To the extent that it may be the latter, "justiciability" as the basis for granting this Writ is set forth in issue III below.

With full knowledge of *Greek* and *McMullen*, the Ninth Circuit held that Holloway's claim for TERA is "non-justiciable" both in that Court and the District Court. App. A at 6a, affirmed App. D (see argument below). Unfortunately, the Ninth Circuit did not cite to these two cases separately as a basis of granting or denying mandamus jurisdiction. The Ninth Circuit relied, instead, on its authority that mandamus is not a waiver of jurisdiction, and, while Holloway argued both cases to the Court, more unfortunately, the Court did not cite to nor discuss *Turner*, 728 F.2d 751. When *Turner* clearly holds that mandamus jurisdiction is available to award monetary relief when the Court of Federal Claims has held that it does not have jurisdiction as to the same claim.

Turner id. claimed payment of a military bonus for medical doctors, called "Variable Incentive Pay" ("VIP"). *Turner* was filed in the U.S. District Court claiming mandamus jurisdiction. The reason for this claim of jurisdiction is and was that the then named Court of Claims dismissed the exact same claim for VIP for want of jurisdiction in *Adair v. United States*, 648 F.2d 1318 (Ct. Cl. 1981) (following this Court's decision in *Testan*, 424 U.S. 392). Since declaratory relief was necessary to overcome the limitation on jurisdiction imposed by the Court of Claims, *Turner* sought such relief coupled with mandamus in the U.S. District Court. The Fifth Circuit indicated that the District Court held that jurisdiction was proper under mandamus, but, notwithstanding, also agreed with the District Court that the claim was properly dismissed on the merits because of the discretionary nature of the claim. *Id.* at 755.[4] Fifth Circuit Court of Appeals held as to mandamus:

> The only means of review of the administrative action in this case is by way of mandamus. . . . This action was properly brought under 28 U.S.C. § 1361, which provides a remedy "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff."

Id. at 755.

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4. Discretion however did not apply to one sub-class, i.e. the CORD physicians. The Fifth Circuit agreed that discretion did not apply to the CORD physicians, but, instead, held on the merits that the CORD physicians had a "moral obligation to serve". While declaratory relief was granted by the Fifth Circuit in the sense that the CORD physicians were eligible, the Court, nevertheless, denied relief on highly questionable, indeed unconscionable, grounds not based on jurisdiction.

Thus, there is, therefor, a split in the Circuits on the availability of mandamus as a proper jurisdictional means of asserting a claim for a monetary payment under a military regulation with companion declaratory relief as to the regulation.

This is a proper basis of issuing the Writ applied for in this Petition, and the Writ should be granted on this basis accordingly.

This is an important question to be decided by this Court in that there are many claims for monetary payments in a variety of settings, not just by military personnel, calling for declaratory relief outside the jurisdiction of the Court of Federal Claims. It is up to this Court to clarify the issue.

II. Denial of Access to the Federal Court System

A. Policy:

Holloway relies on United States Supreme Court Rule 10(c) wherein the Ninth Circuit Court of Appeals, after having before it decisions denying jurisdiction by the U.S. Court of Federal Claims on the same issue, nevertheless held that the Court of Federal Claims does have jurisdiction. The Ninth Circuit has thereby decided an important question of federal law in a way that conflicts with this Court's decision in *Harmon*, 355 U.S. 579, leaving Holloway with no court to review her claim of the illegality of a regulation denying her the relief to which she is or otherwise should be entitled under statute for the reasons she asserts above in the Statement of the Case.

B. All Courts Having Possible Jurisdiction to Review Holloway's Claim Have Held That Each Does Not Have Jurisdiction to Review That Claim and, Indeed, Affirmatively Indicate That the Claim Resides in the Other Court

Holloway has been denied access to the federal court system for review of her non-frivolous claims for relief, both declaratory and monetary. For reasons set forth above, the regulation denying her eligibility for TERA is completely at odds with statute, case law, military practice, and court review of her claim. She needs either declaratory relief to set aside the regulation coupled with either mandamus relief from a U.S. District Court on remand to the U.S. District Court, or mandamus to the BCNR to implement the same. As indicated above, the Court of Federal Claims, as well as this Court in *Testan*, 424 U.S. 392, has held that the Court of Federal Claims is without jurisdiction to declare or otherwise act or set aside a regulation or a statute which does not "in itself" (to use the words of *Testan*) authorize relief. To add confusion to the problem, the Court of Federal Claims engrafts the concept of "justiciability" on claims of Reserve officers starting with the leading case of *Murphy v. United States*, 993 F.2d 871 (1993), and then states that review, contrary to the Ninth Circuit, lies in a U.S. District Court to declare rights. (*See* Argument below)

As both the Ninth Circuit and the U.S. District Court would have it, both would deny that the U.S. District Court is the proper forum to review the claimed right to relief by a military person. App. "A" at 6a, where the Ninth Circuit stated: "The proper jurisdictional question in this case is whether the Claims Court (sic) offers adequate remedies assuming Holloway has asserted a cognizable and justiciable

right, not whether she can ultimately receive the remedies offered." With all due respect to the Ninth Circuit, this statement is patent nonsense and at odds with why our court systems are established to review cases and assign jurisdiction, which is, in Holloway's matter, to review a regulation in line with *Harmon*, 355 U.S. 579. *See also Murphy*, 993 F.2d 871. Moreover, and most importantly, when the referenced court will not grant relief because it has no power to do so within its jurisdiction, that is, plainly stated, a denial of jurisdiction for any purpose in that referenced Court without regard to remedy.

Companion with the previous U.S. Supreme Court cases cited above is this Court's decision in *Larionoff v. United States*, 431 U.S. 864 (1977). *Larionoff* is a military case involving a claim for a bonus, and this Court *declared* on the basis of Court of Federal Claims jurisdiction a regulation as to these claimants void holding that the discretion of the Secretary is limited even though the statute grants discretion and the word "may" conditions eligibility. *Larionoff* was decided a year *after Testan*, 424 U.S. 392, leaving confusion in the Court of Federal Claims as to which precedent applies, and the Court of Federal Claims has arbitrarily eschewed following *Larionoff* and follows *Testan*. *See* discussion by this Court in *Larionoff*, 431 U.S. at pp. 873, *et seq.*, as to the Declaratory relief. *Larionoff* did not cite to *Testan* at all in declaring relief.

This Court in *Larionoff id. declared* the regulation of the Secretary of the Navy void as contrary to statute. There appears to be no case law in the Court of Federal Claims subsequent to *Larionoff declaring* a regulation to be void.[5] There is no discussion in *Larionoff* as to "justiciability"

5. Although see argument below as to justiciability and review of a military correction board.

even though it is reasonable to assume that some of the claimants were Reserves on active duty. (*See* argument III below.) In this connection, there is no discussion whatsoever by this Court in any known case as to "justiciability" as to persons holding military status, whether or not Reserves or in any other military status.

Returning to *Harmon*, 355 U.S. 579, where does Holloway file her claim to obtain the declaratory relief she needs to establish her claim? The purpose of this Writ is for this Court to state where her claim should be filed and guide that Court.

In a leading case decided by the predecessor court to the U.S. Court of Appeals for the Federal Circuit, *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979) has stated, "Where a correction board fails to correct an injustice or a passover is challenged but a back pay claim has arisen, plaintiff's remedies, if any, would be in the district court by mandamus, 28 U.S.C. § 1361, or declaratory judgment, 28 U.S.C. § 2201." *Id.* at 810, n.10. *Sanders* also applies *Testan*, 424 U.S. 392, *id.* at 810. Holloway did, following *Sanders*, seek relief before a U.S. District Court on these two grounds, yet both the District Court and the Ninth Circuit state that jurisdiction lies in the Court of Federal Claims. The Court of Appeals for the Federal Circuit has held that there is no jurisdiction to review the claim of Reserve officer "absent pure legal error". *Murphy*, 993 F.2d at 874. The Court of Appeals added,

> Perhaps Murphy could have sought correction of his records through the Administrative Procedures Act in the district court. (cases cited) (Although "request for retroactive promotion falls squarely

> within the realm of nonjusticiable military personnel decisions," judicial revue of decisions involving the correction of military records is available under the Administrative Procedures Act, 5 U.S.C. § 701(a)(2) (sic).

Id. at 874. Holloway *did*, following *Murphy*, seek review under the APA, and the District Court and the Ninth Circuit both held, nevertheless, that review is in the Court of Federal Claims.

Again, where is Holloway to go to seek relief?

In response to this question, Holloway believes that the case should be heard by the U.S. District Court under either 28 U.S.C. § 1331, with direction to the District Court to refer the matter back to the BCNR to implement relief in accordance with the Court's opinion; or, under mandamus jurisdiction after companion declaratory relief under 28 U.S.C. § 2201 and § 2202 and 5 U.S.C. § 702 in U.S. District Court directing the Respondents directly to do so; or, mandamus directing the BCNR to do so. With respect to § 1331 and mandamus to the BCNR, Holloway's request has compelling precedent in one of the Ninth Circuit's own cases, *Guerrero v. Stone*, 970 F.2d 626 (9th Cir. 1992), and the Ninth Circuit refuses to follow its own authority wherein Mandamus was directed *Id.* at 639.

Additionally, Holloway argued for the application of Fed. R. Civ. P. 57 which states very plainly that the district court should grant declaratory relief even though there is another adequate remedy, and both the Ninth Circuit and the U.S. District Court in Holloway's matter ignored that rule. Fed. R. Civ. P. 57 is noted for the paucity of authority interpreting the rule.

Thus, this quagmire of federal jurisdiction in all courts, conflicting precedent of and by this Court, lack of clarity between the two circuit courts, lack of clarity between the U.S. District Court and the Ninth Circuit in Holloway's claim, as well as between both of those courts on the one hand and the Court of Federal Claims on the other, and absence of direction by this Court, all lead to the unassailable conclusion that this Court must grant this Writ to resolve all of these issues, most importantly to tell the courts where Holloway may have her claim heard somewhere in the federal court system.

III. "Justiciability" Should Not Be Ascribed by Either a U.S. District Court Or the U.S. Court of Federal Claims to a Claim by a Military Reserve Officer When Either Court Reviews a Decision by a Military Correction Board Established under 10 U.S.C. § 1552 under Concepts of Subject Matter Jurisdiction

A. Policy:

Holloway relies on Rule 10(c) of this Court as the Ninth Circuit, U.S. District Court, and the U.S. Court of Federal Claims have indicated that the judicial concept of "justiciability" applies to claims of Reserve officers on active duty after review of a decision of a military correction board under 10 U.S.C. § 1552 without taking into account that each court's review is limited to and by the same subject matter jurisdiction of the military correction board under the Congressional mandate "to correct error and remove injustice".[6] This Writ application raises an important question

6. The Ninth Circuit has stated that Holloway should file her matter in the Court of Federal Claims. If her matter does, in fact, (Cont'd)

of federal law that has not been, but should be, settled by the U.S. Supreme Court, since all courts have not squarely decided, or refuse to decide, this issue of limiting their review to the scope of the subject matter jurisdiction conferred on a military correction board. This is an extremely important issue to Reserve officers on active duty and other military personnel in other settings or status, since otherwise meritorious claims are being systematically dismissed in all courts on the basis of alleged "justiciability".

B. No Case in the Ninth Circuit Or in the Court of Appeals for the Federal Circuit Or in the U.S. Court of Claims Or in this Court Has Squarely Held That Review by a Court of a Decision by a Military Correction Board Removes Review of That Case from the Concept of "Justiciability" on the Ground That the Reviewing Court Is Limited in Its Review to the Scope of the Subject Matter Jurisdiction Conferred on a Correction Board

Holloway's claim was dismissed in part based on the concept of "justiciability" since she was a Reserve officer on active duty and Reserve officers serve at the pleasure of the Secretary of the military department. *Murphy*, 993 F.2d 871, citing to 10 U.S.C. § 681a, *id.* at 872 (now codified in 10 U.S.C. § 12313(a)) Holloway applied for TERA before the BCNR, and said relief was denied.

(Cont'd)

have to end up in the Court of Federal Claims, this issue should be decided now by this Court, if for no other reasons than fairness to Holloway, judicial economy, and guidance to the Court of Federal Claims. This is one reason why the Court of Federal Claims is included in this argument.

Holloway argued to the Ninth Circuit that the subject matter jurisdiction limitation of military correction boards is imposed on reviewing courts as limiting the courts to the same subject matter jurisdiction as that of the military correction board. Holloway argued that no case in any court, including this Court, has ever held precisely that review by a military correction board removes the case from the legal doctrine of "justiciability" in the reviewing court on appeal. The reason is that the subject matter jurisdiction of a military correction board is limited "to correct an error or remove an injustice." 10 U.S.C. § 1552. The reviewing court has the same power, the same as any other appellate court under the original jurisdiction conferred, and, additionally, to ascribe the same to the status of the claimant as does the military correction board "to correct error or remove injustice." It would be different if the reviewing court sat hearing an original claim, absent review and decision by a military correction board. Then, in that case, "justiciability", or the lack of it, would or could be applied depending on the statute or regulation being reviewed.

Since 1993, the U.S. Court of Federal Claims has relied on *Murphy v. United States*, 993 F.2d 871, as precedent for applying the concept of "justiciability", or the lack thereof, to claims of Reserve officers on active duty. It should be noted at this point that *Murphy* held that "justiciability" is separate from jurisdiction and "must first [be] assess[ed] . . . by determining what limits were placed on the Secretary's discretion to release a reserve (sic) officer from active duty." *Id.* at 873 The Court then in *Murphy* discussed the applicability of the jurisdiction (*not justiciability*) conferred

on a military correction board as limiting review by the Court of Appeals for the Federal Circuit:

> Section 1552(a) describes the Correction Boards' jurisdiction to act on behalf of the Secretary to "remove and injustice." It says absolutely nothing about the Claims Court's jurisdiction which is circumscribed solely by the Tucker Act, 28 U.S.C. § 1491, and which demands that the government be called upon to answer in money. Absent that, there is no review in the Claims Court of alleged "injustice".

Id. at 874[7]

The Ninth Circuit decision in *Holloway* in App. A, p. 6a, is also squarely in conflict with the Court of Appeals of the Federal Circuit on the issue of whether "justiciability" is a part of jurisdiction—the Federal Circuit saying no in *Murphy*, *Id.*; the Ninth, yes in *Holloway*.

Cases do discuss the subject matter jurisdiction of a military correction board in relation to error and injustice, but do not reach the issue as argued here as to elimination of "justiciability" in review of a military correction board decision. *See, generally*, *Sanders*, 594 F.2d at 804; *Murphy*, 993 F.2d at 871; *Reale*, 208 Ct. Cl. at 1010; *Sawyer*, 18 Cl. Ct. at 860.[8] *Sanders* involves the claim of a Regular

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7. This language is squarely in conflict with the language of the Court of Appeals for the Federal Circuit in *Sawyer v. United States*, 18 Ct. Cl. 860 (1989), *rvrsd on other grounds*, 930 F.2d 1577 (CAFC 1991), and *Reale v. United States*, 208 Ct. Cl. 1010, *cert. denied*, 429 U.S. 854 (1976), *cert. denied*, 429 U.S. 988 (1976).

8. Two cases before the Court of Appeals for the Federal Circuit are pending decision on this issue. *McMullen v. United States*, (Cont'd)

officer, but nevertheless that which is argued for here is still applicable in terms of the subject matter jurisdiction of the reviewing court, or the lack of reference to the issue, as reflected in the opinions of the courts.

What has occurred here in both the U.S. District Court and the Court of Federal Claims is that the concept of "justiciability" has been engrafted onto claims of Reserve officers, which includes Holloway, by this authority. That authority is, however, in violation of the subject matter jurisdiction of a military correction board as conferred by Congress.

This Court must review this issue since none of the Courts below can reach any kind of uniformity as to the scope of the doctrine of "justiciability" when a court reviews a decision of a military correction board.

(Cont'd)

No. 02-5054, as set forth in footnote 2 herein, and *Fisher v. United States*, No. 02-5082. This Court may well want to defer decision on this Writ until one or both of these cases are decided, since there may well be a split in the circuits between *Holloway* and one or both of these cases. Unlike *McMullen*, *Fisher* was argued on December 2, 2002.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED OCTOBER 11, 2002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-15616

D.C. No. CV-00-00981-SBA

SALLIE B. HOLLOWAY,

Plaintiff - Appellant,

v.

GORDON R. ENGLAND, Secretary of the Navy, et al.,*

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted August 14, 2002
San Francisco, California

Before HALL, KOZINSKI, and MCKEOWN, Circuit Judges.

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* Gordon R. England is substituted for his predecessor as Secretary of the Navy. Fed. R. App. P. 43(c)(2).

Appendix A

MEMORANDUM**

I. Appealability

We have raised *sua sponte* whether the district court's order was a final and appealable order, as we must for issues concerning our jurisdiction. *See WMX Tech., Inc. v. Miller,* 104 F.3d 1133, 1135 (9th Cir. 1997) (en banc). Having raised the question, we find that the answer is yes.

In determining whether the district court's ruling was a final, appealable order, we focus on the effect the court intended to have, whether it intended to end litigation or leave the plaintiff free to file an amended complaint. *See Montes v. United States,* 37 F.3d 1347, 1350 (9th Cir. 1994). Dismissal of the complaint alone is ordinarily not appealable unless the circumstances clearly indicate that the court determined that it could not be saved by amendment. *Id.* Dismissal of an action is final and appealable. *Id.*

We conclude that the district court did intend its order to be final. First, in the one instance in which the October 20, 2000, order directly described the district court's intention, it stated that the court was dismissing the "case." The portion of the order explicating the legal standard under Fed. R. of Civ. P. 12(b)(1) also used consistent terms, describing the test for dismissal of an "action" for lack of subject matter jurisdiction. Though labels are not dispositive, *see id.* at 1350, they do serve as a strong indicator of the district court's intent.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

More importantly, the grounds for dismissal present persuasive evidence that the district court intended to end the litigation. Holloway raised nine separate statutes as bases for the court's subject matter jurisdiction over her claims. The court determined that no combination of the statutes provided the grant of subject matter jurisdiction and waiver of sovereign immunity necessary for it to hear the case. This was not simply a matter of proper pleading, as the court determined that the substance of Holloway's complaint and the remedies she sought could only be brought to the Court of Federal Claims. Holloway's complaint was not susceptible to an amendment that would allow the court to assert jurisdiction over these claims or grant the remedies she seeks. Consequently, the district court did not grant leave to amend the complaint or specify a deadline for doing so, a fact which itself supports an inference of finality. *See Gerritsen v. De La Madrid Hurtado,* 819 F.2d 1511, 1514 (9th Cir. 1987).

We do note that certain aspects of the district court's January 31, 2000, order denying Holloway's motion to amend, create doubt as to the court's actual intentions. In particular, the fact that the order described the court's previous dismissal order as a dismissal of the "complaint," as well as its decision that consideration of the motion was proper under Fed. R. Civ. P. 54, may indicate that it believed Holloway's case had not been finally dismissed at that time. However, given the legal basis for the court's dismissal, we conclude the court did mean to dismiss the case rather than the complaint. Accordingly, we have jurisdiction to hear Holloway's appeal.

Appendix A

II. District Court Jurisdiction

A. The APA

The combined operation of Section 702 of the Administrative Procedure Act ("APA"), codified 5 U.S.C. § 702, and 28 U.S.C. § 1331 did not create jurisdiction in this case because there has been no waiver of sovereign immunity. When a plaintiff invokes federal question jurisdiction by alleging that agency actions violate a federal statute, the APA operates as a limited waiver of sovereign immunity. *See Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998). However, the APA only waives sovereign immunity for circumstances meeting three conditions: 1) the claims are not for money damages, 2) an adequate remedy is not available elsewhere, and 3) the claims do not seek relief expressly or impliedly forbidden by another statute. *Id.* Holloway's claim fails at least the second prong of this test.

Holloway has an adequate remedy in the Court of Federal Claims, assuming she can prevail on the merits. The Tucker Act grants jurisdiction to the Court of Federal Claims:

> to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1).[1] The Tucker Act confers jurisdiction when a plaintiff brings a claim for monetary relief under a substantive statute that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Testan*, 424 U.S. 392, 400 (1976) (internal quotation marks omitted). In this case, Holloway has brought a claim founded on acts of Congress that allegedly mandate compensation in the form of TERA benefits.

Additionally, the Court of Federal Claims can grant the full measure of any relief warranted in this instance. The Tucker Act provides:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

28 U.S.C. § 1491(a)(2). Holloway's complaint seeking placement in retirement status with associated back pay is thus covered by the explicit terms of Section 1491(a)(2).

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1. The Tucker Act also operates as a waiver of sovereign immunity. *United States v. Mitchell*, 463 U.S. 206, 216 (1983).

Holloway nevertheless argues that the Court of Federal Claims cannot provide an adequate remedy because her claims are not justiciable in that forum, citing primarily to *Greek v. United States,* 44 Fed. Cl. 43 (1999) and *McMullen v. United States,* 50 Fed. Cl. 718 (2001). This argument is misplaced.

Assuming that Holloway's claim is non-justiciable in the Court of Claims, it is no less so here, since we are no more empowered than it to resolve questions left to the discretion of the Naval Reserve. *See Khalsa v. Weinberger,* 779 F.2d 1393, 1395 n.1 (9th Cir. 1985); 15 *Moore's Federal Practice,* §§ 101.110-113, .117[9][b] (Matthew Bender 3d. ed. 2002). A problem of justiciability common to both courts does not serve as a basis for assigning jurisdiction to one rather than the other. Rather, the jurisdictional determination is separate from, and must be made prior to, addressing a question of justiciability. *See Khalsa,* 779 F.2d at 1395-96. The proper jurisdictional question in this case is whether the Claims Court offers adequate remedies assuming Holloway has asserted a cognizable and justiciable right, not whether she can ultimately receive the remedies offered.

Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) is of no assistance to Holloway because Holloway's claim is primarily for the payment of money. *Id.* at 796-99; *see also Bowen v. Massachusetts,* 487 U.S. 879, 891, 900 n.31, 904-905 n.39 (1988).

B. Section 1361

The district court also did not err in determining that it could not exercise jurisdiction over Holloway's claim

pursuant to 28 U.S.C. § 1361. Congress' grant of jurisdiction over actions in the nature of mandamus pursuant to 28 U.S.C. § 1361 does not constitute a waiver of sovereign immunity. *See, e.g., Pit River Home & Agric. Coop. Ass'n v. United States,* 30 F.3d 1088, 1098 n.5 (9th Cir. 1994); *Hill v. United States,* 571 F.2d 1098, 1101 n.5 (9th Cir. 1978); *Smith v. Grimm,* 534 F.2d 1346, 1352 n.9 (9th Cir. 1976).

III. Sanctions

The district court's refusal to sanction appellees under Fed. R. Civ. P. 11 for bringing a frivolous motion to dismiss was not an abuse of its discretion. The motion that Holloway describes as frivolous is the very motion that was properly granted for the reasons discussed above.

Sanctioning Holloway under Local Rule 7-9 for repeating previous arguments in her motion to amend was an abuse of discretion. Local Rule 7-9 applies to motions made pursuant to Fed. R. Civ. P. 54 for reconsideration of interlocutory orders. Civil L.R. 7-9(a). Because we interpret Holloway's motion as falling under Fed. R. Civ. P. 59(e), Local Rule 7-9 does not apply, and therefore Holloway cannot be sanctioned under it.

CONCLUSION

The district court's order dismissing the case for lack of subject matter jurisdiction and denying sanctions under Fed. R. Civ. P. 11 is AFFIRMED. The court's *sua sponte* assessment of sanctions for violating Local Rule 7-9 is REVERSED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED JANUARY 31, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 00-00981 SBA

SALLIE B. HOLLOWAY,

Plaintiff,

v.

RICHARD DANZIG, SECRETARY OF THE NAVY, et al.,

Defendants.

ORDER

This matter comes before the Court on Plaintiff's Motion to Amend; Alternatively to Transfer [Docket Nos. 17-1 and 19-1]. Having read and considered all the papers filed in connection with this motion, having considered the arguments advanced by the parties and being fully informed, the Court DENIES Plaintiff's Motion to Amend; Alternatively to Transfer, and ORDERS plaintiff to reimburse defendants up to $1,000.00 for any costs and/or fees incurred in defending this motion as a sanction for plaintiff's violation of Civil L.R. 7-9(c).

Appendix B

I. *BACKGROUND*

By order filed on October 19, 2000 and entered on the docket on October 20, 2000, this Court dismissed plaintiff's complaint without prejudice for lack of subject matter jurisdiction. Because the complaint was dismissed without prejudice, no judgment was entered.

On October 31, 2000, plaintiff Filed a Motion to Amend [Docket No. 17-1]. Then, on November 22, 2000, she filed a second motion, titled Motion to Amend; Alternatively to Transfer [Docket No. 19-1]. The second motion was identical to the first in that it sought an "amendment" to the "judgment". In addition, it included a request in the alternative that the Court transfer the action to the U.S. Court of Claims. Defendants oppose both requests.

II. *DISCUSSION*

A. *Motion to Amend*

Plaintiff's Motion to Amend in essence seeks to convince the Court that it erred in granting defendants' motion to dismiss. *See*, Pl.'s Motion to Amend at 5:12-13 (requesting oral argument so that plaintiff's counsel could "ENLIGHTEN THIS COURT AS TO WHY THIS COURT IS SO CLEARLY IN ERROR") (original all in capital letters). Plaintiff bases her motion on Federal Rules of Civil Procedure ("Rules") 54, 57, and 59. Rule 57 addresses the procedure for obtaining declaratory relief in district courts. Rule 59 authorizes district courts to grant reconsideration following the entry of judgment. Neither authorizes the action plaintiff here requests.

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Rule 54 does vest this Court with discretion to revise its orders prior to entry of final judgment. It states: "[A]ny order which . . . adjudicates fewer than all the claims or rights or liabilities of fewer than all the parties . . . is subject to revision at any time before the entry of [final] judgment. Fed.R.Civ.P. 54(b). "However, Rule 54(b) does not provide a mechanism by which parties may seek reconsideration. Local Rule 7-9(a), of the Northern District of California fills this procedural gap *but requires that a party first obtain leave of the district court before filing a motion to reconsider.*" *Walker v. Carnival Cruise Lines*, 107 F.Supp.2d 1135, 1137 (N.D.Cal. 2000) (emphasis added). *See*, Civil L.R. 7-9(a) ("No party may notice a motion for reconsideration without first obtaining leave of Court to file the motion").

"Civil L.R. 7-9(a) makes clear . . . that a party *must* obtain leave of court *before* noticing the motion for reconsideration." *Qleszko v. State Compensation Insurance Fund*, 1999 WL 33436, at *2 (N.D.Cal.) (emphasis added). "[P]laintiff's failure to obtain leave of court before noticing her motion for reconsideration is an independent and sufficient ground for denying her motion." *Id.* Accordingly, plaintiff's motion hereby is DENIED for that reason alone.

Even if she had followed proper procedure, however, plaintiff's motion would be defective for failure to satisfy Civil L.R. 7-9(b). Civil L.R. 7-9(b) sets forth the following three circumstances under which a motion for leave to file a motion to reconsider may be granted:

> (1) That at the time of the motion for leave [to file a motion for reconsideration], a material

> difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party must also show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or
>
> (2) The emergence of new material facts or changes of law occurring after the time of such order; or
>
> (3) A manifest failure by the Court to consider material facts or dispositive legal argument which were presented to the Court before such interlocutory order.

Civil L.R. 7-9(b). This Court finds that plaintiff has not met the showing required by Civil L.R. 7-9(b) and leave to proceed with her motion for reconsideration therefore is DENIED on that basis as well. *See, Falcon v. Richmond Police Dept.*, 1998 WL 774630, at * 1 (N.D.Cal.), aff'd, 198 F.3d 253 (9th Cir.), cert. denied, 120 S.Ct. 1274, 146 L.Ed.2d 223 (2000).

Moreover, even if the Court were to proceed to consider the motion for reconsideration on its merits, it also would be denied. "To prevail upon a motion to reconsider, a party must set forth facts or law of a strongly convincing nature to induce the Court to reverse is prior decision." *Walker, supra*, 107 F.Supp.2d at 1138 (citing *Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F.Supp. 656, 665 (E.D.Cal. 1986), aff'd in part and rev'd in part on other grounds, 828 F.2d 514 (9th

Cir. 1987), cert. denied, 486 U.S. 1015, 108 S.Ct. 1752, 100 L.Ed.2d 214 (1988)). "'No motion . . . for reconsideration shall repeat any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered.'" *Walker*, *supra*, 107 F.2d at 1138 (quoting Civil L.R. 7-9(c)).

Despite the clear mandate of the local rules, plaintiff's bases her motion *entirely* on written argument which she originally submitted in opposition to defendants' motion to dismiss. Plaintiff does not attempt to hide this fact or characterize her argument in any other way. She incorporates her original opposition brief by reference at the very beginning of her "memorandum of law in support of motion to amend" and then points to case law and legal arguments presented therein which she contends the Court mistakenly overlooked or misunderstood. *See e.g.*, Plaintiff's Motion to Amend at 2:18-19, 3:4-7, 5:19-22, 6:2-3 (reminding the Court of cases cited in plaintiff's original opposition brief and explaining again why those opinions support her argument that the Court has subject matter jurisdiction over her case). The Court is not persuaded. It considered each of the arguments raised in plaintiff's original opposition brief with care and does not agree that its conclusion was in error or that it misapprehended the significance of the authority cited in plaintiff's original brief.

Accordingly, plaintiff's Motion to Amend is DENIED on that basis as well. Moreover, the Court ORDERS plaintiff to reimburse defendants up to $1,000.00 for any costs and/or attorneys' fees actually incurred in opposing her motion.

See, Civil L.R. 7-9(c) ("Any party who violates [the] restriction [against repeating written argument made in opposition to an order in urging reconsideration of it] *shall* be subject to appropriate sanctions") (emphasis added).

B. *Motion to Transfer*

Plaintiff has requested, in the alternative, that the Court transfer her case to United States Court of Claims. "Jurisdictional defects that arise when a suit is filed in the wrong federal court may be cured by transfer under the federal transfer statute, 28 U.S.C. § 1631." *Rodriguez-Roman v. Immigration and Naturalization Service*, 98 F.3d 416, 422 (9th Cir. 1996) (citing *Clark v. Busey*, 959 F.2d 808, 812 (9th Cir. 1992)). That statute provides:

> [w]henever a civil action is filed in a [federal] court . . . or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court, and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1361.

Appendix B

"'Section 1631 does not itself establish jurisdiction, but rather corrects lack of jurisdiction only in cases that are transferred or are at least transferrable.'" *Id.* (quoting *Clark*, *supra*, 959 F.2d at 812). A suit or appeal is 'transferrable' when three conditions have been met.

> 'First, the transferee court must have been able to exercise its jurisdiction on the date [complaint] was misfiled.' [*Kolek v. Egan*, 869 F.2d 1281, 1284 (9th Cir. 1989).] 'Second, the transferer court must lack jurisdiction.'" *Id.* (quoting *Gioda v. Saidpan Stevedoring Co.*, 855 F.2d 625, 629 (9th Cir. 1988)). 'Third, the transfer must serve the interests of justice.' *Id.*

Rodriguez-Roman, *supra*, 98 F.3d at 424. Plaintiff failed to request a transfer before the Court entered its order dismissing her action. Moreover, she presents neither facts nor legal authority to demonstrate that a transfer is "necessary to advance the interest of justice." *Mckeel v. Islamic Republic of Iran*, 722 F.2d 582, 590 (9th Cir. 1983). *See e.g.*, *Rodriguez-Roman*, *supra*, 98 F.3d at 424 (confirming that transfer is in the interest of justice where the errant filing was caused in part by plaintiff's pro se status and lack of fluency in English). Accordingly, her motion to transfer also is DENIED. Plaintiff can refile in the United States Court of Claim without penalty, should she choose to do so.

Appendix B

III. *CONCLUSION*

For the foregoing reasons, the Court DENIES Plaintiff's Motion to Amend; Alternatively to Transfer [Docket Nos. 17-1 and 19-1], and ORDERS plaintiff to reimburse defendants up to $1,000.00 for any costs and/or fees associated in defending this motion as a sanction for plaintiff's violation of Civil L.R. 7-9(c).

IT IS SO ORDERED.

Dated: 1-31-01

s/ Saundra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED OCTOBER 18, 2000, FILED OCTOBER 19, 2000 AND ENTERED OCTOBER 20, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 00-00981 SBA

SALLIE B. HOLLOWAY,

Plaintiff,

v.

RICHARD DANZIG, Secretary of the Navy,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION FOR TERMS

Plaintiff Sallie B. Holloway ("plaintiff") brings this action under the various provisions of 28 U.S.C. §§1331, 1361, 2201, 2202; 5 U.S.C. §702; 10 U.S.C. §§1551, 1552, 5013 *et seq.*, 12001 *et seq.*, to obtain judicial review of a decision by the defendant Secretary of the Navy ("defendant") not to allow her early retirement.

Appendix C

This matter comes before the Court on Defendant's Motion to Dismiss for lack of subject matter jurisdiction. [Doc #7-1] He moves on the basis that plaintiff is attempting to sue the United States, which has not waived its sovereign immunity. Defendant moves in the alternative to deny class certification of plaintiff's claims despite the absence of a motion for class certification. Plaintiff opposes the Motion and requests sanctions imposed on defendant for bringing an allegedly frivolous Motion. [Doc #13-1] Having read and considered all the papers submitted by the parties, having considered the arguments advanced by the parties and being fully informed, the Court GRANTS in part and DENIES in part Defendant's Motion to Dismiss and DENIES Plaintiff's Motion for Sanctions.

BACKGROUND

A. Facts

Sallie Holloway ("plaintiff") voluntarily entered the United States Naval Reserve on or about May 22, 1987. She served as a Reserve Canvasser Recruiter ("CANREC") officer until she was involuntarily released from active duty on or about June 30, 1997. On February 19, 1997, plaintiff requested temporary early retirement under the Temporary Early Retirement Authority ("TERA"). Plaintiff's application for TERA was denied on March 24, 1997, three months prior to her involuntary release. The sole reason given for plaintiff's release was that her "request for extension of service [was] denied." (Pl. Opp. p.3). Upon release, plaintiff received $85,534.68 in separation pay, and she was transferred into the Ready Reserve.

Appendix C

B. Procedural History

On January 13, 1999, plaintiff applied to the Board for Correction of Naval Records ("BCNR") for reinstatement, back pay, restored pension and benefits on the basis that she was a victim of illegal discrimination and that the Chief of Naval Personnel ("CNP") had been practicing illegal discrimination. On October 26, 1999, the BCNR denied plaintiff relief, finding, "the evidence was insufficient to establish the existence of probable material error or injustice." (Def. Mot. p.4).

Plaintiff subsequently commenced this action on March 21, 2000. In her Complaint, she requested that the decisions of the CNP and the BCNR be vacated. In addition, she requested that she be reinstated on active duty at her present rank and accumulated years and retirement points; that she be declared eligible to retire; that she be placed in retirement status; that she be granted back pay and allowances; and that she begin drawing retirement pay at her current grade of Captain (06). (Pl. Complaint ¶.10-11). Plaintiff alleged that the Court has subject matter jurisdiction over her claims based on provisions of several statutes. Defendant did not answer but filed a Motion to Dismiss for Lack of Jurisdiction on June 9, 2000. Plaintiff filed an Opposition and a concurrent Motion for Terms.

Appendix C

ANALYSIS

A. Legal Standard

FRCP 12(b)(1) — Motion to Dismiss for Lack of subject Matter Jurisdiction

Federal Rule of Civil Procedure ("FRCP") 12(b)(1) permits a party to seek dismissal of an action for lack of subject matter jurisdiction. In adjudicating such a motion, the court is not limited to the pleadings, and may properly consider extrinsic evidence. *See Farr v. United States*, 990 F.2d 451, 454 (9th Cir.), *cert. denied*, 114 S.Ct. 634 (1993). The plaintiff bears the burden of establishing subject matter jurisdiction, and the court presumes lack of jurisdiction until the plaintiff proves otherwise. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673,1675 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). "Wherever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3).

B. Application

I. Subject Matter Jurisdiction

Plaintiff cites nine statutes in her Complaint as bases for the Court's subject matter jurisdiction over her claims. Defendant disputes the application of each, and requests that the Court dismiss plaintiff's claims under FRCP 12(b)(1). The central obstacle to plaintiff's claim is sovereign

immunity. A plaintiff may sue the United States and its agencies in federal court only if Congress has specifically waived sovereign immunity for the suit, and jurisdiction lies in the federal courts. *North Star Alaska v. United States*, 9 F.3d 1430, 1432 (9th Cir. 1993). Defendant argues that none of the statutes relied upon by plaintiff serve as ***both*** a basis of federal district court jurisdiction ***and*** a waiver of sovereign immunity. Thus, defendant argues, plaintiff's suit against the United States must be dismissed.

a. Consent to Suit

The United States is immune from suit except to the extent that it consents to be sued. Thus, unless the United States consents to be sued, a court lacks subject matter jurisdiction over the claims brought. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769 (1941). A waiver of sovereign immunity is not to be implied, but "must be unequivocally expressed." *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976). There are plain examples of the Government's waiver of sovereign immunity. Among them, and relevant to this case, is the Administrative Procedures Act (APA), 5 U.S.C. § 702. The APA waives sovereign immunity for actions against the U.S. and its agencies arising under federal law to the extent that ***nonmonetary relief*** is sought. *Blue v. Widnall*, 162 F.3d 541, 544-545 (9th Cir. 1998) (emphasis added). The APA provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant

> statute, is entitled to judicial review thereof. An action in a court of the United States seeking ***relief other than money damages*** and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority ***shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party***. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought. (emphasis added).

Defendant correctly points out that none of the other statutes cited by plaintiff waive sovereign immunity:

**** 28 U.S.C. §1331 [Federal Question Jurisdiction]:*** While there is no Ninth Circuit authority directly on point, the Second Circuit has stated that, "Section 1331 is in no way a general waiver of sovereign immunity. Such waiver, if it exists at all, must be sought in the statute giving rise to

the cause of action." *Doe v. Civiletti*, 635 F.2d 88, 94 (2d Cir. 1980).

**** 28 U.S.C. §1361 [Mandamus]*:** The Second Circuit also has held that, "the mandamus statute [is not] an all-purpose waiver of the Government's immunity from suit." *Civiletti*, 635 F.2d at 94. *See also Tucson Airport Authority v. General Dynamics Corp.*, 922 F. Supp. 273, 285 (D.Az. 1996) (noting without citing any authority that mandamus relief was barred when plaintiff failed to identify a waiver of sovereign immunity). Both parties devote a great deal of space in their memorandums to arguing whether mandamus is appropriate in the present action. However, even if the Second Circuit's holding were not persuasive, as discussed in Section (B)(1)(b)(2) *infra*, the Court finds that the conditions for mandamus relief here are not met.

**** 28 U.S.C. §§2201, 2202 [Declaratory Relief]*:** Plaintiff apparently does not argue that these statutes provide the Court with jurisdiction. She argues that they merely provide a "basis for Mandamus jurisdiction to be invoked." (Pl. Opp. p.13, n.7). These statutes are discussed in the section on Mandamus relief, although as stated directly above, Mandamus relief is barred in any case because there has been no waiver of sovereign immunity.

**** 10 U.S.C. §§1551, 1552, 5013, 12001*:** Plaintiff apparently has abandoned theses statutes as bases for her claims because she does not discuss them in her Opposition. The Court, therefore, does not address them.

Appendix C

b. Federal District Court Jurisdiction

1. The APA and Federal Question Jurisdiction (28 U.S.C. §1331)

Indisputably, the APA waives sovereign immunity with respect to *equitable* claims against the United States. Defendant, however, argues first that the APA does not confer jurisdiction in the federal courts, and second that plaintiff's claims are more accurately categorized as legal, not equitable. Defendant's first contention appears irrefutable. The Supreme Court has concluded that, "the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Califano v. Sanders*, 430 U.S. 99, 107, 97 S.Ct. 980, 985 (1977). *See also Tucson Airport Authority v. General Dynamic Corp.*, 136 F.3d 641, 645 (9th Cir. 1998) (citing *Sanders* and affirming summary judgment for the United States on the ground of lack of jurisdiction). In *Sanders*, the Supreme Court held that the district court did not have jurisdiction to review a decision of the Secretary of Health, Education, and Welfare not to reopen a previously adjudicated claim for social security benefits.

On the other hand, several courts have determined that where the substantive rights at issue *originate under federal law*, and the APA waives sovereign immunity for those claims, the government's alleged unlawful action violating those rights allows a court jurisdiction under 28 U.S.C. §1331 and APA §702. *See Tucson*, 136 F.3d at 645. A waiver under APA §702 is limited, however. Specifically, the APA waives sovereign immunity for claims brought under §1331 (i.e. federal question claims) *only* if three conditions all are met:

1. The "claims are not for money damages";

2. "An adequate remedy for the claims is not available elsewhere"; *and*

3. The "claims do not seek relief expressly or impliedly forbidden by another statute."

Id. In *Tucson*, the Ninth Circuit found that the plaintiff's claims met the first two prongs but could not meet the third prong. Specifically, the Ninth Circuit found that the plaintiff sued the U.S. for (1) specific performance of a contract (*not money damages*), and (2) that there was no adequate remedy available elsewhere because money damages would be inadequate, and the Court of Federal Claims (an appropriate forum for seeking money damages against the United States) was not authorized to grant equitable relief. *Id.* However, the court held that, because the plaintiff's claims were *contractually-based*, the Tucker Act, 28 U.S.C §1491, impliedly forbade declaratory and injunctive relief and precluded a §702 waiver of sovereign immunity. *Id.* at 646 (emphasis added). In this case, plaintiff's claims are analyzed under the three prongs below.

a. Monetary Relief

Defendant argues that plaintiff's claims are inherently for money damages. She requests back pay and allowances (Pl. Complaint p.11), as well as reinstatement, which would require defendant to pay her certain sums of money. Plaintiff asserts, to the contrary, that her claims are solely for equitable relief. Specifically, she requests that the Court review provisions of NAVADMIN 144/96 to determine whether that instruction complies with applicable retirement statutes.

(Pl. Opp. p.4). She claims that she merely requests that the Court declare the naval regulation invalid, and claims that the BCNR later will fashion the appropriate remedy. (Pl. Opp. p.7). Finally, she asserts that this Court *should not* order any monetary relief. (Pl. Opp. p.8).

Plaintiff's argument (particularly on ¶.7-8) is confusing. She avers that this Court does not have the power to, nor should it, award monetary damages. However, she also states that if the Court grants her request, the BCNR would award her monetary relief. Moreover, in her Complaint (at least with respect to Count II) she expressly makes a prayer for "back pay and allowances from 01 July 1997 to date." (Pl. Complaint p.11). In the end, plaintiff is tripped up by her own pleading. At least with respect to Count II of the Complaint, plaintiff cannot satisfy the first prong of the *Tucson* test because she clearly *does* seek monetary damages in the form of back pay and allowances. Therefore, sovereign immunity is not waived.

Moreover, defendant raises a strong argument that Counts I and III are claims for monetary relief, as well. On those counts, plaintiff merely prays for (1) reinstatement, (2) a declaration that she is eligible to retire under TERA with her retirement accumulated both before and since 01 July 1997, (3) an instruction that the BCNR place her in retirement status (Count I), and finally (4) class certification and class relief for Counts I and II (Count III). None of these requests appear on the face to be for monetary relief. Nonetheless, defendant cites, and plaintiff does not respond to, several cases that look beyond a plaintiff's primarily-monetary claims couched in equitable clothing. For example, in *Mathis v. Laird*, 483 F.2d 943 (9th Cir. 1973), plaintiff, who was separated from the Air Force following a

court-martial conviction, brought a claim in district court challenging the court-martial proceedings. The Ninth Circuit ordered a dismissal of the claims, holding that the Court of Claims had exclusive jurisdiction over the plaintiff's monetary claims. *Id.* In so doing, the court noted that plaintiff's claims for back pay, allowances, and a promotion, although cast in terms of an action for mandamus and a declaratory judgment, essentially constituted "a case for a monetary judgment." *Id.* at 943.

Similarly, in *Denton v. Schlesinger*, 605 F.2d 484, 486 (9th Cir. 1979), the plaintiffs requested two forms of relief. First they wanted damages for allegedly illegal termination from the military. Second, they wanted to be restored to their former positions, with all the wages, retirement benefits, and other remunerations attendant to that status. *Id.* The court followed *Mathis* and determined that the Court of Claims was the proper forum to bring this type of action because it essentially sought a "monetary judgment." It, therefore, affirmed the district court's dismissal of the action for lack of jurisdiction. *Id.* at 488.

Plaintiff has requested the same type of relief as that requested by the plaintiffs in *Denton* and *Mathis*. Although she couches her claims in terms of equitable relief, her phrasing is not controlling. She alleges that she actually is challenging the constitutionality of the naval regulations and defendant's authority under federal statute. However, her claim essentially is one for back pay and retirement benefits, that is, money damages. Such claims must be brought in the Claims Court, not here.

b. Adequate Remedy Elsewhere

Even if plaintiff's claims were nonmonetary, she cannot pass the second prong of the *Tucson* analysis. Unlike the plaintiff in *Tucson*, plaintiff, here, has an adequate remedy elsewhere, namely, the Federal Claims Court. Plaintiff argues that the Claims Court will not be able to grant her the equitable relief that she requests. She cites *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948 (1976) and *Murphy v. United States*, 993 F.2d 871 (Fed.Cir. 1993) in support of her argument that a district court, alone, can grant her relief. (Pl. Opp. p.8). Plaintiff neglects, however, to direct the Court's attention to any specific pages or passages from those decisions. After reviewing those decisions, the Court does not find support for plaintiff's contentions. Moreover, defendant has cited several cases that stand for the opposite conclusion. That is, that the Claims Court may, in certain instances, grant equitable relief.

For example, in *Mitchell v. United States*, 930 F.2d 893 (Fed.Cir. 1991), the plaintiff was discharged from the Air Force after 18 years of active duty in the reserves. In his action challenging his discharge, he requested back pay, reinstatement, and correction of records. *Mitchell*, 930 F.2d at 896. The court held that whether the plaintiff characterized his complaint as a claim for money damages or for equitable relief, "his type of case ha[d] traditionally invoked Claims Court jurisdiction. Moreover the Claims Court can provide Mitchell a complete remedy." *Id.* at 897. In other words, the Claims Court could in appropriate military back pay cases provide equitable remedies, such as restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records. *Id.* at 896.

Plaintiff's claims are closely analogous to those in *Mitchell*. They are primarily for money damages. Therefore, the Court of Claims has jurisdiction over her claims and can also sort out any equitable problems that arise. Plaintiff's claims are unlike the claim in *Tucson*, which was solely equitable, for specific performance of a contract. Hence, the facts in *Tucson* are distinguishable from those at issue in the present case because here plaintiff does have an adequate remedy elsewhere, the Court of Claims.

c. Relief Forbidden by Another Statute

In *Tucson*, the Ninth Circuit held that the Tucker Act forbade the district court from exercising jurisdiction over the plaintiff's ***contractually-based*** claims. 136 F.3d at 647 (emphasis added). However, it noted that if the claims were ***statutorily-based***, then the district court would have had a basis for jurisdiction. *Id.* at 646-47 (citing *North Side Lumber Co. v. Block*, 7753 F.2d 1482, 1486 (9th Cir. 1985), which held that the Tucker Act did not forbid relief on the statutory claim at issue there). Plaintiff's claims here are characterized more accurately as statutorily-based. Naval reservists are not under contract, but serve under the authorization of Congress and the Department of the Navy. Hence, applying, *Tucson* and *North Side Lumber*, the Tucker Act would not preclude plaintiff from bringing her claims in district court.

However, because plaintiff's claims do not meet the first two prongs of the *Tucson* test, this third prong becomes irrelevant. Consequently, sovereign immunity has not been waived, and the Court has no jurisdiction under the APA and 28 U.S.C. §1331 to decide plaintiff's claims.

Appendix C

2. Mandamus Relief — 28 U.S.C. §1361

A district court has mandamus jurisdiction over plaintiff's claims only if three elements are met:

a. "The plaintiff's claim is clear and certain;

b. "The defendant official's duty to act is ministerial and so plainly prescribed as to be free from doubt; and

c. "No other adequate remedy is available."

Barron v. Reich, 13 F.3d 1370, 1374 (9th Cir. 19940. *See also*, *Work v. United States*, 267 U.S. 175, 177, 45 S.Ct. 252, 252 (1925) (Mandamus can issue only if the act sought to be compelled is ministerial rather than discretionary.). Only if the act to be compelled is ministerial can the plaintiff demonstrate that she has a clear right and that the defendant has a clear duty to act.

As mentioned in the preceding section, plaintiff here has an adequate alternative remedy available in the Court of Claims. Consequently, mandamus jurisdiction does not lie. Even if she did not have an adequate remedy, however, she still could not establish mandamus jurisdiction because she cannot meet the first two prongs of the test. First, she cannot point to a clear and certain right to her claims. Nor can she argue that defendant has a clearly prescribed duty to act. Plaintiff's argument that this Court's potential declaratory relief under 28 U.S.C §§2201 and 2202 would satisfy the first two prongs of the test for mandamus relief confirms

this conclusion. (Pl. Opp. p.13). In essence, she concedes that she needs an order granting declaratory relief to establish a clear right and a clear duty. In establishing a clear right and a clear duty, however, a plaintiff cannot rely on a court's declaring that it is so. She must provide the court a basis for such a finding. Plaintiff has not done so in this case.

Moreover, plaintiff also cannot establish that the act she wishes to compel is ministerial. She argues that if the Court grants mandamus, defendant will have to perform certain ministerial acts, such as calculating retirement pay. She misses the point. It is the grant of early retirement, not the calculation of retirement pay, that she wishes the Court to compel. This grant or denial of early retirement is wholly discretionary, as revealed in plaintiff's own exhibits. (Appendix II, Exh.4, p.7). Mandamus relief is, therefore, inappropriate in this case, and 28 U.S.C. §1361 cannot be a basis for the Court's jurisdiction.

In sum, plaintiff has not demonstrated a basis for this Court's jurisdiction. Consequently, her complaint is dismissed without prejudice.

II. Class Certification

Defendant argues in the alternative that class certification must be denied and that count III of plaintiff's complaint should be dismissed. (Def. Mot. p.18). As plaintiff has not even moved for class certification, defendant's motion is premature. Moreover, the issue is moot because the Court orders the case dismissed for lack of subject matter jurisdiction. For this reason, the Court denies defendant's alternative motion to deny class certification.

Appendix C

III. Rule 11 Sanctions

Rule 11 sanctions may only be ordered based on a properly noticed, separate Motion filed by a party or if the Court enters an order on its own initiative. Fed.R.Civ.P. 11(c)(1). Plaintiff has petitioned the Court to impose sanctions on defendant's counsel for making a frivolous argument in support of his Motions to Dismiss. Because plaintiff has not complied with the procedural requirements for imposing Rule 11 sanctions, the Court denies plaintiff's request.

Rule 11 requires the moving party to serve a motion for sanctions on the opposing party at least 21 days prior to filing the motion with the Court. Fed.R.Civ.P. 11(c)(1)(A). This "safe harbor" provision allows the party-to-be-sanctioned an opportunity to retract the offensive pleadings before forcing the court to get involved. The provision is mandatory. In *Barber v. Carlsen*, 146 F.3d 707, 710 (9th Cir. 1998), the Ninth Circuit held that, "It would . . . wrench both the language and purpose of . . . Rule [11] to permit an informal warning to substitute for service of a motion." In *Barber*, the plaintiff's patent claim was determined frivolous. The defendant had called plaintiff repeatedly to give notice of the deficiency. The defendant also informed the plaintiff that Rule 11 sanctions would be sought it the complaint was not withdrawn, but the defendant never *served* a Rule 11 motion on the plaintiff before filing it with the court. The Ninth Circuit ruled that the defendant's "warnings were not motions, however, ***and the Rule requires service of a motion***." *Barber*, 146 F.3d at 710 (emphasis added).

Similarly, in this case, plaintiff's counsel alleges that he put defendant's counsel on notice "soon after [he] received the

Motion and its Memorandum of the frivolous nature of the same." (Holcomb Decl. p.3). He further alleges that, **"MORE THAN 21 DAYS HAS ELAPSED SINCE THIS TELEPHONE CALL."** *Id.* (emphasis in original). Nevertheless, plaintiff failed to ***serve*** this Motion on defendant. As in *Barber*, the Court will not permit an informal warning to substitute for service of the Motion.

In addition, plaintiff also did not comply with the separate motion provision of Rule 11. Rule 1 I requires that, "A motion for sanctions . . . shall be made separately from other motions or requests." Fed.R.Civ.P. 11(c)(1)(A). In *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147, 151 (7th Cir. 1996), the Seventh Circuit construed this separate motion requirement strictly. There, the defendant included its request for sanctions as part of its motion to dismiss. The court ruled that this did not meet the notice requirement imposed by Rule 11(c)(1)(A). Thus, in effect, "there was no motion for sanctions and the court was left to act on its own initiative if sanctions were to be considered." *Id.* Likewise, in the present case, plaintiff included her request for sanctions in her Opposition to defendant's Motion to Dismiss. She has not complied with the separate motion requirement.

Because plaintiff did not comply with the safe harbor and separate motion provisions of Rule 11, the Court will not consider the substance of the Motion. The Motion is denied.

Appendix C

CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED THAT the defendant's Motion to Dismiss is GRANTED in part and DENIED in part and plaintiff's Motion for Sanctions is DENIED.

IT IS SO ORDERED.

DATED: October 18, 2000

s/ Saundra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 4, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-15616

D.C. No. CV-00-00981-SBA

SALLIE B. HOLLOWAY,

Plaintiff - Appellant,

v.

GORDON R. ENGLAND, Secretary of the Navy, et al.,*

Defendants - Appellees.

ORDER

Before: HALL, KOZINSKI, and MCKEOWN, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

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* Gordon R. England is substituted for his predecessor as Secretary of the Navy. Fed. R. App. P. 43(c)(2).

APPENDIX E — NAVY REGULATIONS INVOLVED

Temporary Early Retirement Authority
("TERA") authorized by statute

* * *

3. Following is an overview of NAVADMIN 144-96:

Para 4 TAR, Naval Reserve Canvasser Recruiter, and Temporary Recall Officer Eligibility

* * *

4. TAR, Naval Reserve Canvasser Recruiter, and Temporary Recall Officer Eligibility.

A. The following officers are required to separate and may elect TERA. All must apply in order to be retired under TERA.

Those who choose not to apply will be issued separation orders. TAR officers must have completed at least 15 years of active-duty service and 8 years of commissioned service by their requested retirement date. Naval Reserve Canvasser Recruiters and Temporary Recall Officers must have completed at least 18 years of active-duty service.

(1) TAR officers in the grade of LT, LCDR, and CDR who have failed of selection (FOS) to the next higher grade at least twice.

(2) TAR commanders who are SERAD'd by Board Action.

(3) Naval Reserve Canvasser Recruiter Officers required to be released from active duty.

(4) Temporary Recall (Statutory Tour, "265," One-Year Recall, and Active Duty For Special Work) Officers who have accumulated at least 18 years of active-duty service.

B. TERA is available on a voluntary, limited basis only for TAR commanders with at least 15 years of active-duty service.

* * * *